FILE COPY

FILED

JUN 13 1969

JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 234

HENRY J. CZOSEK, et al.,
Petitioners,

v.

JOHN R. O'MARA, GEORGE McCORMICK, JULIUS PACKARD, WALTER DALY, and ERIE LACKAWANNA RAILROAD COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CLARENCE M. MULHOLLAND
RICHARD R. LYMAN
741 National Bank Building
Toledo, Ohio 43604

Attorneys for Petitioners

OF COUNSEL:

MULHOLLAND, HICKEY & LYMAN
741 National Bank Building
Toledo, Ohio 43604

LIPSITZ, GREEN, FAHRINGER, ROLL, SCHULLER & JAMES
One Niagara Square
Buffalo, New York 14202

INDEX

Table of Contents

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	4
Reasons for Granting the Writ	7
1. The decision below is in conflict with applicable decisions of this Court	7
2. The decision below is in conflict with applicable decisions of other courts of appeals	12
3. This case involves important questions concerning the conduct of a vital and perhaps major segment of labor-management relations, which the court below has decided in such a way as to seriously disrupt collective bargaining and the statutory procedures for disposition of employee grievances and contract claims in the railroad industry	16
Conclusion	18
Appendices:	
A. Judgment of Court of Appeals	1a
B. Order of Court of Appeals Denying Rehearing	3a
C. Opinion of Court of Appeals	4a
D. Decision and Order of District Court	13a

Table of Citations

Cases: Page

Balowski v. *International U., United A. A. & A. Imp. Wkrs.*, 372 F. (2d) 829 ..... 14, 15

Brotherhood of Railroad Trainmen v. *Chicago River & Indiana Railroad Co.*, 353 U.S. 30 16

Conley v. *Gibson*, 335 U.S. 41 10

Gainey v. *Brotherhood of Railway & Steamship Clerks, etc.*, 313 F. (2d) 318 15

Gunther v. *San Diego & A. E. R. Co.*, 382 U.S. 257 16

Slagley v. *Illinois Central Railroad Company*, 397 F. (2d) 546 ..... 12, 13

Slocum v. *Delaware, L. & W. R. Co.*, 339 U.S. 239 17

Steen v. *Local Union No.* 163, *United Auto., A. & A. Imp. Wkrs.*, 373 F. (2d) 519 14

Union Pacific Railroad Co. v. *Price*, 360 U.S. 601 18

Vaca v. *Sipes*, 386 U.S. 171 ..... 7, 8, 9, 10, 12

Statutes:

Interstate Commerce Act (49 U.S.C. Sec. 5, et seq.) 6

Railway Labor Act, as amended, (45 U.S.C. Sec. 151, et seq.) 6, 16

Railway Labor Act, as amended,

Section 3 First (i), (54 U.S.C. Sec. 153 First (i)) 3

Section 3 First (j), (45 U.S.C. Sec. 153 First (j) 3

Section 3 First (m), (45 U.S.C. Sec. 153 First (m)) 3, 4

United States Code

28 U.S.C., Section 1254 (1) 2

Page

Miscellaneous:
Federal Rules of Civil Procedure,
(Rule 12(b)) 11

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1969

NO.

HENRY J. CZOSEK, et al.,
Petitioners,

v.

JOHN R. O'MARA, GEORGE McCORMICK, JULIUS PACKARD, WALTER DALY, and ERIE LACKAWANNA RAILROAD COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioners[1] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on February 24, 1969, rehearing denied March 18, 1969.

[1] The petitioners are Henry J. Czosek, Henry J. Czosek as Chairman, Local Lodge 826 of the International Brotherhood of Firemen and Oilers, Local No. 826, Edward P. McEntee, System Federation No. 78, and System Federation No. 100. The International Brotherhood of Firemen and Oilers, listed as one of the defendants-appellees in the caption of the proceedings below, was not served with summons and did not appear in the courts below.

OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix C, is reported at 407 F. (2d) 674. The decision and order of the District Court, printed in Appendix D, is not reported.

JURISDICTION

The judgment of the Court of Appeals was dated and entered February 24, 1969. (Appendix A.) Rehearing was denied by the Court of Appeals March 18, 1969. (Appendix B.) The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

QUESTIONS PRESENTED

1. May an action for damages brought by railroad employees against their employer for alleged wrongful discharge, and against their union and its representatives for failure to process their claims against the railroad, be dismissed as to the railroad on the ground of exclusive jurisdiction in the National Railroad Adjustment Board, but continue to be maintained as a "fair representation" case against the union and recovery sought solely from it, where the damages claimed stem from the alleged wrongful discharge by the employer in breach of the collective bargaining agreement, independent of any conduct by the Union?

2. May railroad employees maintain an action against their union for failure to process their grievances without exhausting their administrative remedies, when there is no showing that it would have been futile for them to do so, and no claim is made that they could not personally press their rights under the collective bargaining agreement and before the National Railroad Adjustment Board?

3. Is a proper claim for violation of a union's duty of fair representation stated by a complaint which fails to

allege any facts which would constitute hostile discrimination by the union, or furnish any basis from which such hostile discrimination could reasonably be inferred?

STATUTES INVOLVED

The statutory provisions principally involved are Sections 3 First (i), (j) and (m) of the Railway Labor Act (45 U. S. C., Sec. 153 First (i), (j) and (m):

"Section 3. First . . . .

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

"(j) Parties may be heard either in person, by counsel. or by other representatives, as they may respectively elect, and the several divisions of the Ajustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

• • •

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute."

STATEMENT OF THE CASE

This action was instituted by four employees of the Erie Lackawanna Railroad Company (named as a respondent herein along with the four employee plaintiffs) who alleged that they were furloughed from their positions as stationary engineers in June of 1962, and replaced by employees of the former Erie Railroad, as a result of the merger of the former Delaware, Lackawanna and Western Railroad Company and the Erie into the present company, and that they received no compensation from defendant Railroad Company for their loss of employment. It was alleged that this constituted a violation of the Interstate Commerce Act and the "Implementing Agreement" between the Railroad Company and its employees, and that the Railroad Company violated the Railway Labor Act by failing to give plaintiffs 30 days' advance notice of a change in working conditions. In addition it was alleged that the treatment of which plaintiffs complained constituted a wrongful discharge, and the complaint purported to predicate jurisdiction on diversity of citizenship and jurisdictional amount as well as on the fact that the action was claimed to arise under the Interstate Commerce Act and the Railway Labor Act.

The only charge asserted against defendants other than the Railroad Company was that they failed to process claims on behalf of plaintiffs to remedy the asserted wrongful acts of the Railroad Company, and it was said that this amounted to hostile discrimination and a violation of the terms of "the collective bargaining agreement."

Motions to dismiss the complaint, for lack of jurisdiction of the subject matter and failure to state a claim upon which relief could be granted, were filed by the Railroad Company and by the union defendants (petitioners here), and sustained by the District Court on a finding of no basis for federal jurisdiction. With respect to the claim against the union defendants, the District Court said:

> "Although the plaintiffs use the phrase 'hostile discrimination' in asserting that the defendants arbitrarily and capriciously failed to process their claims, use of that phrase alone does not bring their claim within the rationale of *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944). No attack is directed at the validity of the collective bargaining agreement and no claim is made that these plaintiffs could not personally press their rights under the collective bargaining agreement. *Cf. Ferro* v. *Railway Express Agency, Inc.*, 296 F. 2d 847 (2d Cir. 1961)." (Appendix D., p. 13a.)

Plaintiffs did not file or seek leave to file an amended complaint but instead appealed from the decision of the District Court.

The Court of Appeals reversed this holding as to the union defendants, on the ground that the complaint stated a federal claim against the union for breach of its duty of fair representation. As to the Railroad Company, however, dismissal of the complaint was affirmed on the ground of exclusive primary jurisdiction of the National Railroad Adjustment Board over plaintiffs' claim of wrongful discharge in violation of the collective bargaining agreement. The Court of Appeals further held that on remand plaintiffs should be granted leave to amend their complaint to state a cause of action against the Railroad Company, but that in order to do so they would have to show joint discrimination of the company with the union, that is a combined attempt to discriminate. Absent such amendment of the complaint, the decision of the Court of Appeals leaves the plaintiffs free to pursue the independent remedies of a court action for damages against the union, and a claim filed with the National Railroad Adjustment Board against the Railroad Company based on its alleged breach of the collective bargaining agreement.

The basis for federal jurisdiction in the court of first instance, the United States District Court for the Western District of New York, as alleged by plaintiffs, was that there was diversity of citizenship and more than $10,000.00 in controversy; that the action arose under the Interstate Commerce Act (49 U.S.C. Sec. 5 et seq.); and that the action arose under the Railway Labor Act (45 U.S.C., Sec. 151 et seq.).

REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict with applicable decisions of this Court.

In holding that the plaintiffs could maintain an action against the union defendants for damages for violation of the duty of fair representation, but could proceed against the Railroad Company on their wrongful discharge claim only before the National Railroad Adjustment Board, the Court of Appeals ignored this Court's holding in *Vaca* v. *Sipes*, 386 U.S. 171, a leading decision on the fair representation principle. In its opinion the *Vaca* case is not cited, referred to or discussed.

In that case an employee, claiming that he had been wrongfully discharged in violation of the collective bargaining agreement, brought suit against the union claiming that it had breached its duty of fair representation by refusing to process his grievance. The employer was not made a party to the action, and the plaintiff obtained a judgment of compensatory and punitive damages against the union based on the employer's breach of contract. This Court reversed the judgment, and as one of the grounds for reversal held that damages could not be recovered from the union for the employer's breach of contract. The Court said:

> " . . . Though the union has violated a statutory duty in failing to press the grievance, it is the employer's unrelated breach of contract which triggered the controversy and which caused this portion of the employee's damages. The employee should have no difficulty recovering these damages from the employer, who cannot, as we have ex-

> plained, hide behind the union's wrongful failure to act; in fact, the employer may be (and probably should be) joined as a defendant in the fair representation suit, as in *Humphrey* v. *Moore*, supra." (386 U.S., p. 197.)

The decision of the Court of Appeals in the present case stands squarely in conflict with *Vaca* v. *Sipes*, supra. It holds that the plaintiff employees *are* entitled to maintain an action to recover damages solely from the union for "the employer's unrelated breach of contract which triggered the controversy," and that an employer *can* "hide behind the union's wrongful failure to act."

That the complaint here alleged only an "employer's unrelated breach of contract" was recognized by the Court of Appeals when, in its remand order, it permitted plaintiffs to amend their complaint, if they could, to allege complicity between the union defendants and the Railroad Company. Such disposition of the appeal leaves the case in the anomalous situation where the only way the union can escape the full burden of liability for the employer's breach of contract is for the plaintiff employees to show that the union induced, or conspired to procure, that breach.

This result, and the rationale and holding of the court below, are directly at odds with this Court's decision in *Vaca* v. *Sipes*, supra. As the Court indicated in that portion of the opinion quoted above, the fact that the employer is primarily or totally responsible for plaintiffs' damages makes it essential that the employer be made a party to the action, and the union cannot be made to assume the employer's burden of damages.

Further in clear conflict with the *Vaca* decision is the ruling below to the effect that plaintiffs could proceed

separately against the union and the Railroad Company before two different tribunals, the District Court and the National Railroad Adjustment Board. As the Court said:

> "These remedy problems are difficult enough when one tribunal has all parties before it; they are impossible if two independent tribunals, with different procedures, time limitations, and remedial powers, must participate." (386 U.S.,-p. 188, footnote 12.)

This decision below also fails to recognize and properly apply general principles of exhaustion of administrative remedies and arbitration procedures which this court has formulated in numerous decisions in the labor-management field. That these principles have application in a fair representation case such as this was made clear in the Court's opinion in the *Vaca* case. As the Court stated, " . . . it is settled that the employee *must at least attempt* to exhaust exclusive grievance and arbitration procedures established by the collective bargaining agreement. Republic Steel Corp. v. Maddox, 379 U. S. 650, 13 L. Ed. (2d) 580, 85 S. Ct. 164." (386 U.S., pp. 184-185; emphasis supplied.)

In the instant case there was no showing that plaintiffs had attempted to pursue available administrative remedies individually, after the alleged refusal of the union to process their wrongful discharge claims. It was conceded, and recognized by the Court of Appeals, that they could have done so. Indeed, in sustaining dismissal of the action as to the Railroad Company, the court below limited plaintiffs to their administrative remedy before the National Railroad Adjustment Board, in pursuing their breach of contract claim against their employer. But it held

that in suing the *union*, for damages *occasioned by the same breach* of contract, " . . . plaintiffs need not establish that they 'could not personally press their rights under the collective bargaining agreement' in order to maintain this action against the union." (Appendix C, p. 4a; 407 F. (2d), pp. 678-679.)

Conley v. *Gibson*, 335 U. S. 41, cited by the Court of Appeals in this context, does not stand for the proposition that an employee can recover damages from his union for the employer's breach of contract. It was an action to compel the union to handle grievances on an impartial basis, without discrimination as to race, and held that Negroes as well as white employees were entitled to the advantages and assistance of union representation in this area. It was not a suit for damages stemming from a breach of contract, but rather sought judicial enforcement of the right to be represented in the administrative processing of such a claim.

Finally, *Vaca* v. *Sipes*, supra, emphasizes that a mere showing of a refusal to handle an employee's grievance is not sufficient to make out a case against the union based on unfair representation. Even though the grievance be shown to be meritorious, the employee must show that there was bad faith, arbitrary conduct, or hostile discrimination on the part of the union. (386 U.S., pp. 188-195.)

Even tested by the very liberal standards of federal notice pleading, the complaint in this case clearly fails to state a claim against the union for violation of its duty of fair representation. Beyond claiming that the union refused to process their grievance, plaintiffs have alleged no facts which would even support an inference of bad faith, arbitrary conduct or hostile discrimination on the part of the union defendants.

The insufficiency of the complaint with respect to the fair representation claim against the union was in fact recognized by the Court of Appeals. In the portion of its opinion dealing with this aspect of the case, it states:

> "The complaint does not make clear the basic reason why plaintiffs are aggrieved . . . " (App. C., p. 4a; 407 F. (2d), p. 679.)

At the hearing before the Court of Appeals, counsel for plaintiff sought to cure the inadequacy of the complaint by arguing orally, completely *extra* the record, that the union's refusal to handle the grievance was motivated by political considerations. In discussing this contention the Court of Appeals again pointed up the inadequacy of the complaint, saying:

> " . . . we do not think that this basis of the claim can be fairly inferred from the face of the complaint . . . " (App. C., p. 4a; 407 F. (2d), p. 679).

Nevertheless, the court below proceeded to ignore the acknowledged insufficiency of the complaint, and attempted to justify reversal of its dismissal by the District Court on the grounds that the defendants might have developed the nature of plaintiffs' unstated claim by discovery, and that "a plaintiff should be given the opportunity to file supplemental pleadings." (App. C., p. 4a; 407 F. (2d), p. 679.) But plaintiffs neither sought nor were denied an opportunity to amend their complaint; and we submit that defendants should not be compelled to cure the deficiencies in a complaint which they are entitled to have dismissed under Rule 12(b) of the Federal Rules of Civil Procedure.

2. The decision below is in conflict with applicable decisions of other courts of appeals.

As this Court pointed out in its opinion in *Vaca* v. *Sipes*, 386 U.S. 171, other courts of appeals have consistently entertained actions of employees based on rights under the collective bargaining agreement where both the employer and union were joined as defendants, where the gist of the claim against the union was, as here, that it had failed to process the employee's grievance. (386 U.S., pp. 185-187.) The action of the court below in permitting the suit to be maintained only against the union conflicts with those cases as well as this Court's decision in the *Vaca* case.

With respect to its rulings on the lack of any duty of plaintiffs to attempt to exhaust administrative remedies, and the sufficiency of the complaint in spite of its failure to allege anything from which the essential element of bad faith on the part of the union might be inferred, the holding of the court stands squarely in conflict with recent decisions of other courts of appeals.

With respect to exhaustion of remedies, the Court of Appeals for the Seventh Circuit, in *Slagley* v. *Illinois Central Railroad Company*, 397 F. (2d) 546, after recognizing the statutory right of individual railroad employees to submit their claims to the National Railroad Adjustment Board (as contrasted with contractual arbitration procedures outside the railroad industry where, as in *Vaca* v. *Sipes*, arbitration is not available unless invoked by the union), stated the rule as follows:

> "However, we need not decide whether the differences between the statutes render the *Maddox-Vaca* principles inapplicable to minor disputes under the Railway Labor Act. To come within the *Maddox-Vaca* exception to the general exhaustion requirement an employee seeking to enforce a collective bargaining agreement must allege that he has attempted to utilize the available contract grievance procedure and that his attempt has been thwarted by union conduct constituting a breach of the duty of fair representation .... Appellant's complaint is plainly insufficient. It contains no allegation that he attempted to use the contract grievance procedures or file his claim with the Adjustment Board." (397 F. (2d), pp. 551-552).

In the same case, in passing on the sufficiency of plaintiff's allegations of the bad faith essential to a fair representation claim against the union, the court said:

> "The pertinent allegations of the complaint are that the O.R.C. & B. compelled I.C. to deprive appellant of his seniority, that this action was 'wrongful, unlawful, and unconstitutional,' 'arbitrary and capricious,' and 'constituted wrongful and unlawful discrimination toward plaintiff,' and that the action breached the collective bargaining agreement and violated the Federal and Indiana Constitutions. We find these allegations insufficient to state a claim for breach of the duty of fair representation. They are mere conclusions of law, plainly insufficient under the Federal Rules of Civil Procedures .... " (397 F. (2d), p. 552.)

Similiarly applying the requirement of exhaustion of remedies, when available, in a fair representation case, is the decision of the Court of Appeals for the Sixth Circuit *Steen* v. *Local Union No.* 163, *United Auto., A. & A. Imp. Wkrs.*, 373 F. (2d) 519. In that case, as here, plaintiff's claim against his union was that it had refused to initiate a grievance on his behalf. In sustaining a dismissal of the complaint, the court said:

> "Plaintiff communicated with the foreman neither verbally nor in writing. He did contact various officials of the local and international unions, but to allow such activity to serve as a substitute for the contractual grievance procedures would be to 'deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances.' Republic Steel Corp. v. Maddox, supra. 379 U.S. at 653, 85 S. Ct. at 617 . . . . " (373 F. (2d), p. 520.)

On the sufficiency of allegations of bad faith in a fair representation case, the decision below sharply conflicts with another decision of the Court of Appeals for the Sixth Circuit. In *Balowski* v. *International U., United A., A. & A. Imp. Wkrs.*, 372 F. (2d) 829, that court said:

> "The allegations of a complaint alleging the breach of a Union's duty of fair representation must contain more than 'conclusory statements alleging discrimination. In particular plaintiffs must make a showing that the action or inaction of the statutory representative complained of was motivated by bad faith, for the gravamen of the rule is "hostile discrimination".' Gainey v.

> Brotherhood of Railway Employees, 313 F. 2d 318, 323 (C.A. 3). '[C]onclusory words * * * without a concomitant showing a lack of good faith [does] not set forth a claim.' Hardcastle v. Western Greyhound Lines, 303 F. 2d 182, 186 (C.A. 9), cert. denied, 371 U.S. 920, 83 S. Ct. 288, 9 L. Ed. 2d 229. See also Colbert v. Brotherhood of Trainmen, 206 F. 2d 9 (C.A. 9), cert. denied, 346 U.S. 931, 74 S. Ct. 320, 98 L. Ed. 422; Ostrofsky v. United Steelworkers, 171 F. Supp. 782 (D. Md.) aff'd 273 F. 2d 614, cert. denied, 363 U.S. 849, 80 S. Ct. 1628, 4 L. Ed. 2d 1732." (372 F. (2d), p. 835.)

Similarly, the Court of Appeals for the Third Circuit set forth requirements of pleading bad faith or hostile discrimination of the union which plaintiffs here clearly failed to meet. In *Gainey* v. *Brotherhood of Railway & Steamship Clerks*, etc., 313 F. (2d) 318, that Court said:

> " . . . the complaint before us must have more than conclusory statements alleging discrimination. In particular plaintiffs must make a showing that the action or inaction of the statutory representative complained of was motivated by bad faith, for the gravamen of the rule is 'hostile discrimination.' An allegation that certain conduct of the Brotherhood or a condition permitted to exist by it is 'invidious' and 'discriminatory', without a concomitant indentification of lack of good faith, will not set forth a claim sufficient to call for the use of the Steel doctrine." (313 F. (2d), p. 323.)

As we have noted, and as the court below conceded, the complaint in the present case alleged nothing more than the bare conclusion that the union's refusal to process

plaintiffs' grievances constituted hostile discrimination. The record is silent as to any facts from which bad faith or a discriminatory motive could be inferred. Absent such bad faith or improper motive, it is clear from this Court's decisions and those of other courts of appeals that plaintiffs have not stated a sufficient claim against the union defendants for violation of the duty of fair representation.

3. This case involves important questions concerning the conduct of a vital and perhaps major segment of labor-management relations, which the court below has decided in such a way as to seriously disrupt collective bargaining and the statutory procedures for disposition of employee grievances and contract claims in the railroad industry.

Although categorized as "minor disputes," grievances and contract claims of employees constitute the week-in-week-out, year-around business of the collective bargaining process. To avoid interruptions to commerce resulting from strikes over such disputes Congress provided, in the Railway Labor Act (45 U.S.C., Sec. 151 et seq.) for a complete system of compulsory arbitration before the National Railroad Adjustment Board, eliminating the strike as a legitimate means of settling these "minor disputes." *Gunther* v. *San Diego & A.E.R. Co.*, 382 U.S. 257, *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana Railroad Co.*, 353 U.S. 30.) The Board's jurisdiction over

such disputes is exclusive (*Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239.)

The effect of the decision below is to open the doors of the courts to litigation over all employee grievances and contract claims which the union fails or refuses to process, while at the same time leaving the employee free to process the same claim or grievance, simultaneously or consecutively, before the National Railroad Adjustment Board. The court below prescribed no measure of damages or limit upon the recovery which the employees might obtain in their damage action against their union, or in their Adjustment Board proceeding against the Railroad Company. Presumably it contemplated that a full recovery against either or each might be had for whatever damages had been suffered by the employees as a result of the alleged breach of contract by the Railroad Company. And presumably, if the employees should fail to prevail on the merits before one tribunal, they would have a second chance before the other.

On the basis of the holding below, a union can be forced to defend a court action for damages whenever it refuses to process a grievance. As in the instant case, all that must be alleged is that such refusal constituted "hostile discrimination." The disruptive effects of such a rule are aptly described in this Court's opinion in *Vaca* v. *Sipes*, 386 U.S. 171, pp. 191-192. Unions would be compelled either to process all grievances and contract claims of the employees they represent, or to handle none of them, and abandon this large segment of the collective bargaining function to individual handling. Either course would be disastrous, from the point of view of both employer and em-

ployees, and the statutory arbitration procedure before the Adjustment Board would be so overburdened as to become unworkable.

Similar effects would ensue if, as held below, grievances could be processed twice, before two different tribunals. As the Court of Appeals for the Seventh Circuit said, in commenting upon this Court's ruling in *Union Pacific Railroad Co.* v. *Price*, 360 U.S. 601:

> " . . . A contrary holding would make a shambles of the statutory and contractual provisions for the settlement of grievances." (382 F. (2d) 780, 786; cert. den. 389 U.S. 1042.)

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

OF COUNSEL:

MULHOLLAND, HICKEY & LYMAN
741 National Bank Building
Toledo, Ohio 43604

LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES
One Niagara Square
Buffalo, New York 14202

CLARENCE M. MULHOLLAND
741 National Bank Building
Toledo, Ohio 43604

RICHARD R. LYMAN
741 National Bank Building
Toledo, Ohio 43604

Attorneys for Petitioners

APPENDIX A

JUDGMENT OF COURT OF APPEALS

(Entered February 24, 1969)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of February, one thousand nine hundred and sixty-nine.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge

HON. HENRY J. FRIENDLY,
Circuit Judge,

HON. MARVIN E. FRANKEL,
District Judge.

John R. O'Mara, George McCormick, Julius Packard and Walter Daly,
Plaintiffs-Appellants,

v.

Erie Lackawanna Railroad Co., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of New York.

Judgment of Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings in accordance with the opinion of this Court with costs to be taxed against the appellees.

A. DANIEL FUSARO
Clerk

APPENDIX B

ORDER OF COURT OF APPEALS DENYING REHEARING

(Entered March 18, 1969)

32184

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

John R. O'Mara, George McCormick,
Julius Packard and Walter Daily,
Plaintiffs-Appellants,

v.

Erie Lackawanna Railroad Company,
et al.,
Defendants-Appellees.

A petition for a rehearing having been filed herein by counsel for the International Brotherhood of Firemen and Oilers, Henry J. Czosek, Henry J. Czosek as Chairman of Local 826, and Edward P. McEntee, appellees herein.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is Denied.

/s/ J. Edward Lumbard
U.S.C.J.
Marvin E. Frankel
U.S.D.J.

APPENDIX C

OPINION OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS

For The Second Circuit

No. 211—September Term, 1968.

(Argued December 4, 1968 Decided February 24, 1969.)

Docket No. 32184

John R. O'Mara, George McCormick, Julius Packard and Walter Daly,

Plaintiffs-Appellants

—v.—

Erie Lackawanna Railroad Company, International Brotherhood of Firemen and Oilers, Henry J. Czosek, Henry J. Czosek as Chairman of Local 826, and Edward P. McEntee,

Defendants-Appellees.

B e f o r e :

Lumbard, *Chief Judge*, Friendly, *Circuit Judge*, and Frankel, *District Judge*.*

Appeal from an order of the District Court for the Western District of New York, Henderson, *J.*, granting defendant's motion to dismiss the complaint for lack of federal jurisdiction.

Reversed and remanded.

* Sitting by designation

Opinion of Court of Appeals

James P. Shea, Buffalo, N.Y. (Flaherty & Shea, on the brief), *for plaintiffs-appellants.*

Richard F. Griffin, Buffalo, N. Y. (Moot, Sprague, Marcy, Landy & Fernbach, and Courtland R. LaVallee, on the brief), *for appellee, Erie Lackawanna Railroad Company.*

Richard R. Lyman, Toledo, Ohio (Lipsitz, Green, Fahringer, Roll, Schuller & James, Buffalo, N. Y., and Mulholland, Hickey & Lyman, Toledo, Ohio, on the brief), *for defendants-appellees Henry J. Czosek, Henry J. Czosek as Chairman, etc., and Edward P. McEntee, etc.*

Lumbard, *Chief Judge*:

Plaintiffs brought this action in the District Court for the Western District of New York seeking damages for their allegedly wrongful discharge, without compensation, from employment as stationary engineers with the Erie Lackawanna Railroad. Joined as defendants with the Railroad are the International Brotherhood of Firemen and Oilers and several of its affiliates and officers. The complaint alleged that the union defendants had been guilty of "hostile discrimination" in refusing to process plaintiffs' grievances against the Railroad.

The district court granted defendants' motion to dismiss the complaint, finding no basis for federal jurisdiction.

We reverse. We hold that the complaint, read in the generous spirit appropriate under the Federal Rules, states a federal claim against the union for breach of its duty of fair representation. On remand we grant plaintiffs leave to amend their complaint, if they can, to state a cause of

action against the Railroad based on its having acted with knowledge of the union's discrimination. *Glover* v. *St. Louis-San Francisco Ry. Co.*, 37 U. S. L. W. 4084 (U. S. Jan. 14, 1969); *Ferro* v. *Railway Express Agency, Inc.*, 296 F. 2d 847 (2d Cir. 1961).

Prior to 1960 the plaintiffs were employed by the Delaware, Lackawanna & Western Railroad as stationary engineers in a power plant in Buffalo, New York. In that year the Delaware merged with the Erie Railroad, with the approval of the Interstate Commerce Commission, forming the present defendant Erie Lackawanna line. Plaintiffs were continued in their former positions by the merged line until 1962, when they were furloughed.

The complaint is very grudging in its recitation of the claims upon which federal jurisdiction is invoked. It is alleged that the 1962 furlough constituted a discharge of plaintiffs since they were never recalled and were in fact replaced by employees who had worked for the Erie Railroad before the merger. The complaint then claims that the discharges were the direct result of the 1960 merger, and violated "the Interstate Act 49 USCA Sect. 5 et seq." and the "Implementing Agreement" between the Erie Lackawanna and its employees represented by defendant unions. A violation of the Railway Labor Act, 45 U.S.C.A. §151 *et seq.*, is also alleged in that the Railroad failed to give the required 30 days written notice of an intended change in working conditions prior to the discharge of the plaintiffs.

Finally it is alleged that plaintiffs repeatedly requested the defendant unions and their officials to process their claims against the Railroad, but that these defendants "have been guilty of gross nonfeasance and hostile discrimi-

nation in their arbitrary and capricious refusal to process said claims," and "have breached their duty and have discriminated against the rights of the Plaintiffs, by violating the express and implied terms of the collective bargaining agreement in effect by not representing the Plaintiffs fairly and impartially in the Plaintiff's loss of employment and the resulting loss of compensation therefrom." The prayer is for judgment in the sum of $160,000 against any or all of the defendants.

The district court was correct, on the allegations before it, in dismissing the portion of the complaint claiming a violation of the Implementing Agreement by the Railroad in discharging plaintiffs. It is settled that such a contract dispute between employees and a railroad falls within the primary jurisdiction of the National Railroad Adjustment Board, 45 U.S.C. §153 First (i). See *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R.R. Co.*, 353 U.S. 30, 34-35, 39 (1957); *Walker* v. *Southern R.R. Co.*, 385 U.S. 196, 198 (1966). It follows that plaintiffs cannot maintain an action for damages under federal law since their complaint does not allege that they have exhausted their remedy before the Board. The union's refusal to process their grievances does not excuse plaintiff's failure to exhaust since individual employees have standing to prosecute their own grievances before the Board, 45 U.S.C. §153 First (j); cf. *Pacilio* v. *Pennsylvania R.R. Co.*, 381 F. 2d 570, 572 (2d Cir. 1967). Nor is this conclusion altered by the allegation that the Railroad failed to give to the union the 30 days notice of a change in working conditions required by 45 U. S. C. §156. See *Hudie* v. *Aliquippa & Southern Railroad Co.*, 249 F. Supp. 210,

212 (W. D. Pa.), *aff'd per curiam* 360 F. 2d 213 (3rd Cir. 1966).

Ostensibly the complaint alleges that the Railroad's action was wrongful in two distinct respects, i.e., that it violated the Implementing Agreement between the Railroad and the union, and that it violated the Interstate Commerce Act. In reality, however, it appears that the basis of both these claims lies in the Implementing Agreement, and that therefore the doctrine of exhaustion of administrative remedies is fatal to both claims.

On appeal we are informed that the section of the Act relied upon is 49 U.S.C. §5(2)(f),[1] which provides certain

---

1 49 U. S. C. §5(2)(f) provides:

"As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

safeguards for employees affected by a railroad merger. The Supreme Court has ruled that this section does not prevent the discharge of employees as a result of a merger, but rather relates only to questions of compensation. *Brotherhood of Maintenance of Way Employees* v. *United States*, 366 U. S. 169 (1961). The complaint provides us with no indication that plaintiffs are attacking any action taken by the Interstate Commerce Commission under §5(2)(f), nor does it allege in what respect the section has been violated. The section does authorize a railroad and union to enter into an agreement protecting the interests of workers affected by a merger. To the extent that plaintiffs have been wronged it appears to have been through a misapplication of the Implementing Agreement. Thus once again we have the type of employee-employer contract dispute which under federal law must be submitted first to the Railroad Adjustment Board and not to the courts. Cf. *Arnold* v. *Louisville & Nashville R.R. Co.*, 180 F. Supp. 429 (M.D. Tenn. 1960), *aff'd sub nom. Batts* v. *Louisville & Nashville R.R. Co.*, 316 F. 2d 22 (6th Cir. 1963). Dismissal of this portion of the complaint was proper, in addition, because it did not give defendants "fair notice" of the basis of plaintiffs' claim under the Act. *Conley* v. *Gibson*, 355 U. S. 41, 47 (1957).

But we think that a different result is required concerning the portion of the complaint which alleges "hostile discrimination" on the part of the union defendants in refusing to process plaintiffs' claims against the railroad. In *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192, 203 (1944), the Supreme Court held that the Railway Labor Act imposes upon unions a duty to represent fairly, without "hostile discrimination," all workers within a bargain-

ing unit. Since a charge by an employee against a union for a violation of this duty does not involve a dispute between "an employee or group of employees and a carrier or carriers," 45 U.S.C. §153 First (i), it does not fall within the jurisdiction of the Railroad Adjustment Board. Therefore it may be the basis of a suit in a federal district court. *Conley* v. *Gibson*, 355 U.S. 41 (1957); *Cunningham* v. *Erie Railroad Co.*, 266 F. 2d 411, 414-16 (2d Cir. 1959).

This is true even where the claim of hostile discrimination is based on the union's failure to process a grievance and it is clear that the employees themselves could have carried their grievance to the Adjustment Board. The Supreme Court has held that this right to process a grievance personally cannot excuse a union's refusal to fulfill its duty of fair representation, for the union is in a far better position successfully to process a grievance than are individual workers. *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Thus, we disagree with the district court and hold that plaintiffs need not establish that they "could not personally press their rights under the collective bargaining agreement" in order to maintain this action against the union.

The only real question is whether the complaint's allegation of "hostile discrimination" is so unexplicated that it fails to give union defendants fair notice of the ground of plaintiffs' claim. The only hint concerning the nature of the discrimination is the complaint's statement that plaintiffs were replaced by " 'pre-merger' employees of the Erie Railroad."

The complaint does not make clear the basic reason why the plaintiffs are aggrieved, as stated to us upon the argument of the appeal, namely, that the union defendants are under the influence of the former employees of the Erie

Railroad and as a result are not representing fairly the interests of the former employees of the Delaware, Lackawanna & Western Railroad in the merged line. It is settled that such a claim of political discrimination states a good cause of action under the Railway Labor Act. *Ferro* v. *Railway Express Agency, Inc.*, 296 F. 2d 847, 851 (2d Cir. 1961).

While we do not think that this basis of the claim can be fairly inferred from the face of the complaint, by the exercise of the liberal pre-trial and discovery devices available to them the defendants will be able to dispel any possible prejudice to them arising from the very broad nature of the allegations. See *Conley* v. *Gibson*, 355 U.S. 41, 47-48 (1957). Particularly in suits of this kind, where the courts are called upon to fulfill their role as the primary guardians of the duty of fair representation, complaints should be construed whenever possible to avoid dismissals based on technical deficiencies in the specificity of the allegations. At the least a plaintiff should be given the opportunity to file supplemental pleadings unless it appears "beyond doubt" that he cannot state a good cause of action. *Cf. Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).

On remand we hold plaintiffs should be granted leave to amend their complaint to state a cause of action against the Railroad, if they can, within the doctrine of *Ferro* v. *Railway Express Agency, Inc.*, 296 F. 2d 847, 851 (2d Cir. 1961). There we suggested that, in a suit against a union for "hostile discrimination" the employer can be joined as a party defendant if it "acted from a motive to discriminate or with knowledge that the [union] was discriminating." 296 F. 2d at 851. Where the employer's action is only a consequence of the union's discriminatory conduct, *e.g.*,

Cunningham v. *Erie Railroad Co.*, 266 F. 2d 411 (2d Cir. 1959), or takes the form of joint discrimination with the union, then plaintiffs should be allowed to join the employer and the union in one action. *Glover* v. *St. Louis-San Francisco Ry Co.*, 37 U. S. L. W. 4084 (U. S. Jan. 14, 1969). And since the dispute draws its basic character from the union's violation of its duty of fair representation, recourse to the Railroad Adjustment Board should not be required insofar as the employer is fairly alleged to be implicated in the union's illegal conduct. *Id.*, 37 *U. S. L. W.* at 4085-86.

But dismissal of the employer from this suit will be proper if it appears that its action furloughing the plaintiffs, and the union's discriminatory refusal to process grievances concerning these furloughs, were not part of a combined attempt to discriminate. In that event plaintiffs' complaint against the Railroad would concern a violation of their rights under the collective bargaining agreement and this, as discussed above, falls within the exclusive primary jurisdiction of the Ajustment Board.

The order of the district court is reversed and the complaint against the union is reinstated, with leave to the plaintiffs to amend the complaint to state a cause of action against the Railroad. If plaintiffs are unable so to amend then the complaint against the Railroad should be dismissed.

APPENDIX D

DECISION AND ORDER OF DISTRICT COURT

(Issued January 10, 1968)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOHN R. O'MARA; GEORGE McCORMICK; JULIUS PACKARD; and WALTER DALY,
Plaintiffs

—vs— CIVIL 1967-30

ERIE LACKAWANNA RAILROAD COMPANY; INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS; ANTHONY E. MATZ, International President, International Brotherhood of Firemen and Oilers; FRED R. McKERNAN, General Chairman, System Council No. 2, International Brotherhood of Firemen and Oilers; HENRY J. CZOSEK, Chairman Local No. 826, International Brotherhood of Firemen and Oilers; SYSTEM COUNCIL NO. 2, International Brotherhood of Firemen and Oilers, LOCAL NO. 826; SYSTEM FEDERATION NO. 78; and SYSTEM FEDERATION NO. 100,
Defendants.

Lipsitz, Green, Fahringer, Roll, Schuller & James (Richard Lipsitz, Esq., of Counsel), Buffalo, New York, Attorneys for Defendants Henry J. Czosek, Henry J. Czosek as

Chairman, Local Lodge 826, and
Edward P. McEntee.
Moot, Sprague, Marcy, Landy &
Fernbach (Richard F. Griffin, Esq.,
of Counsel), Buffalo, New York,
Attorneys for Defendant Erie
Lackawanna Railroad Company.

Flaherty & Shea (James P.
Shea, Esq., of Counsel),
Buffalo, New York,
Attorneys for Plaintiffs.

The plaintiffs are members of Local 826, System Federation No. 78 and Council No. 2 of the International Brotherhood of Firemen and Oilers. They were originally employed as stationary engineers of the Delaware, Lackawanna & Western Railroad. In September of 1960, however, the Interstate Commerce Commission authorized the merger of the Delaware, Lackawanna & Western Railroad with the Erie Railroad into the present Erie Lackawanna Railroad. Thereafter, in June of 1962, the plaintiffs were furloughed from their employment and replaced by pre-merger employees of the Erie Railroad.

The plaintiffs commenced this action seeking damages alleged to flow from their loss of employment. Before the court are motions by the defendants, who have been served in this action, to dismiss the complaint for lack of jurisdiction over the subject matter and for failure to state a claim for which relief can be granted.

Inasmuch as diversity of citizenship clearly is lacking as among the parties, jurisdiction may not be predicated upon that ground. *Treinies* v. *Sunshine Mining Co.*, 308 U.S. 65, 71 (1939), *American Fire & Cas. Co.*, v. *Finn*, 341 U. S. 6, 17 (1951). The plaintiffs argue, however, that the action may be sustained either as a suit for wrongful discharge or as a suit based upon hostile discrimination.

Assuming, without deciding, that the complaint may be viewed as a discharge grievance subject to arbitration under the Railway Labor Act (45 U. S. C. §§151 et seq.), the action would be governed by the principles set forth in *Moore* v. *Illinois Central Railroad Co.*, 312 U. S. 630 (1941) and *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U.S. 653 (1953). *Walker* v. *Southern Ry. Co.*, 385 U.S. 196 (1966). These decisions permit an aggrieved railroad employee to elect to treat his discharge as final without exhausting his administrative remedies when, and only when, diversity jurisdiction exists and such exhaustion is not required under applicable state law. See *Larson* v. *American Air Lines, Inc.*, 313 F. 2d 599, 602 (2d Cir. 1963); *Walters* v. *Chicago & Northwestern Ry. Co.*, 216 F. 2d 332, 335-336 (7th Cir. 1954). Here, not only is diversity jurisdiction lacking, but it also seems clear that the New York courts would require exhaustion. See *Pacilio* v. *Pennsylvania R.R. Co.*, 381 F. 2d 570 (2d Cir. 1967). The complaint does not allege, and in opposition to this motion the plain-

tiffs have not claimed that they have exhausted their administrative remedies.

Although the plaintiffs use the phrase "hostile discrimination" in asserting that the defendants arbitrarily and capriciously failed to process their claims, use of that phrase alone does not bring their claim within the rationale of *Steele v. Louisville & Nashville R.R. Co.*, 323 U. S. 192 (1944). No attack is directed at the validity of the collective bargaining agreement and no claim is made that these plaintiffs could not personally press their rights under the collective bargaining agreement. *Cf. Ferro* v. *Railway Express Agency, Inc.*, 296 F. 2d 847 (2d Cir. 1961).

Finding no basis for federal jurisdiction, the complaint is dismissed. So ordered.

/s/ John O. Henderson
JOHN O. HENDERSON
United States District Judge

DATED: Jan. 10, 1968.